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No. 90-843

In The

# Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

*Petitioner,*

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

*Respondent.*

On Writ Of Certiorari
To The Supreme Court
Of South Carolina

## BRIEF ON THE MERITS BY RESPONDENT

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## RESTATED QUESTION PRESENTED

May an employee of a State-owned railroad sue his employer in state court for money damages under the Federal Employers' Liability Act (FELA) even though Congress has not clearly and unequivocally expressed an intent that FELA apply to the States?

## TABLE OF CONTENTS


| | Page |
|---|---|
| RESTATED QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| SUMMARY OF ARGUMENT | 1 |
| ARGUMENT | 5 |
| CONCLUSION | 22 |




## TABLE OF AUTHORITIES


Page

CASES:

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) ..... 2, 8, 10, 15, 20

Chisholm v. Georgia, 2 U.S. 419 (1793) ..... 5

Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883) ..... 7

Dellmuth v. Muth, 491 U.S. 223 (1989) ..... 2, 3, 8, 9, 11, 12, 15

Edleman v. Jordan, 415 U.S. 651 (1974) ..... 20, 21

Employees v. Missouri Public Health Dep't, 411 U.S. 279 (1973) ..... 6, 7, 8

Ex Parte New York, 256 U.S. 490 (1921) ..... 6

Fry v. United States, 421 U.S. 542 (1975) ..... 5, 6

Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985) ..... 2, 4, 15, 16, 18

Hans v. Louisiana, 134 U.S. 1 (1890) ..... 1, 5, 6, 7, 20

Howlett v. Rose, 496 U.S. ___, 110 S.Ct. 2430 (1990) ..... 3, 7, 12, 21

Hutto v. Finney, 437 U.S. 678 (1978) ..... 8

Matter of McVey Trucking, Inc., 812 F.2d 311 (7th Cir. 1987) cert denied, 484 U.S. 895 (1987) ..... 16

Morris v. Massachusetts Maritime Academy, 409 Mass. 179, 565 N.E.2d 422 (1991) ..... 15

Mossman v. Donahay, 46 Ohio St. 2d 1, 346 N.E.2d 305 (1976) ..... 13, 15

TABLE OF AUTHORITIES – Continued

Page

National League of Cities v. Usery, 426 U.S. 833 (1976) ..... 18

Parden v. Terminal Ry., 377 U.S. 184 (1964)... 14, 18, 20

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) .....8, 9

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) ..... 2, 3, 6, 10, 12, 19

Principality of Monaco v. State of Mississippi, 292 U.S. 313 (1934) ..... 19

Quern v. Jordan, 440 U.S. 332 (1979) ..... 8

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) .... 10

Tenney v. Brandhove, 341 U.S. 367 (1951) ..... 13

Testa v. Katt, 330 U.S. 386 (1947)..... 7

United Transportation Union v. Long Island R.R., 455 U.S. 678 (1982) ..... 18

Welch v. Texas Dep't of Highways and Public Transp., 780 F.2d 1268 (5th Cir. 1986) aff'd, 483 U.S. 468 (1987) .....16, 17

Welch v. Texas Department of Public Highways and Public Transportation, 483 U.S. 468 (1987) .....*passim*

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) ..... *passim*



TABLE OF AUTHORITIES – Continued

Page

STATUTES:

42 U.S.C. § 1983 (1986) .....10, 12

45 U.S.C. § 159(a) (Supp. I 1990)..... 18

Federal Employers Liability Act, 45 U.S.C. § 51 ..... 1

MISCELLANEOUS:

L. Tribe, American Constitutional Law, § 3-37 at 140 (1978)..... 17

The Federalist, No. 81 (A. Hamilton)..... 7

## SUMMARY OF ARGUMENT

The State of South Carolina, through its Public Railways Commission, has been sued for money damages in a South Carolina court, by a South Carolina citizen, on a claim arising under a federal statute enacted pursuant to the Commerce Clause. The statute purports to reach "every common carrier by railroad" but makes no mention of States as defendants. Federal Employers Liability Act, 45 U.S.C. § 51 (1981). This Court has already ruled that a state is immune from a FELA claim in federal court because Congress did not clearly express an intent that States be subject to FELA claims in federal court.[1] This case, like *Will v. Michigan*, was brought in state court; the Eleventh Amendment is not, therefore, directly applicable.[2] The question left open in *Welch* and now before the Court, is whether Congress created a money damages remedy against the States enforceable against a State in her own courts.

The teaching of *Hans v. Louisiana*,[3] that States are Constitutionally clothed with attributes of sovereign immunity apart from the precise language of the Eleventh Amendment or limits on federal judicial power, though much debated, remains the law today. There is a more general Constitutional dimension to sovereign immunity which is as much deserving of protection as is the States' specific Eleventh Amendment immunity from suit in

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[1] *Welch v. Texas Department of Public Highways and Public Transportation*, 483 U.S. 468 (1987).

[2] *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

[3] 134 U.S. 1 (1890)

federal court. Whenever a State is made answerable to an individual for money damages upon a federally created cause of action, an abrogation of the State's immunity has occurred, regardless of whether the State is required to appear in a federal court, or any court of its own creation. When Congress sets out to abrogate the States' Eleventh Amendment immunity from suit in federal court, it must do so with clear, unambiguous language in the text of the statute itself.[4] There is no distinction between these Constitutionally recognized immunities which would justify differing standards of Congressional clarity to abrogate one or the other.

If FELA is to apply to state-owned railroads, it must be that Congress has the Constitutional power under the Commerce Clause to create a money damages remedy against the States, and the Congress has exercised that power with sufficient clarity to enable this Court to be certain of Congress' intent. Although the Constitutional power of Congress in this context is open to some question[5], it is not necessary that the Court revisit the power debate to resolve this case. The South Carolina Public Railways Commission assumes, but does not concede, that Congress has the Constitutional authority to subject it to the FELA.[6] This Court need only go so far as

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[4] *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Welch v. Texas Department of Public Highways and Public Transportation*, 483 U.S. 468 (1987); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

[5] *See, Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., dissenting).

[6] *See, Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).



to hold that an exercise of this assumed Constitutional power on the part of Congress must be accompanied by a clear and unequivocal expression of Congressional intent. There being no such expression of intent in the text of the FELA, the decision of the South Carolina Supreme Court that the FELA does not apply to a state owned railroad should be affirmed.[7]

We believe that this case presents an opportunity for this Court to adopt a straightforward rule:

> A State will not be subject to suit in its own courts on a federally created cause of action for money damages unless Congress clearly and unequivocally expresses its intent, in the text of the statute, that the States be among the class of potential defendants envisioned by the statute.

Such a rule would be a simple corollary to now settled principles of Eleventh Amendment immunity. This formulation is suggested by, and consistent with the language in, several recent decisions of this Court, including *Will v. Michigan*, *Pennsylvania v. Union Gas*, *Dellmuth v. Muth* and *Howlett v. Rose*[8]. Most importantly, the principle we propose would best accommodate the inevitable tension between Congress' Commerce Clause authority to regulate and continuing need to respect the special and independent role of States in our federal system.

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[7] *Welch* should be regarded as dispositive on the question of whether the FELA contains a clear statement of legislative intent to include the States among the class of possible defendants. In any event, neither Petitioner nor his Amicus make any argument to the contrary.

[8] 496 U.S. ___, 110 S.Ct. 2430 (1990)

In *Garcia v. San Antonio Metropolitan Transit Authority*[9], this Court again grappled with Congressional power vis-a-vis the sovereign interests of the several States and concluded:

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discreet limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

*Garcia*, 469 U.S. at 552.

If, as *Garcia* teaches, a State's only protection from federal Commerce Clause encroachment upon its sovereignty is the political process, it follows that the Constitutional role of this Court, at a minimum, is to see that the political machinery has addressed the question at hand. Requiring Congress to clearly state its intent in unequivocal terms in the statute itself ensures that the national legislature, after clear notice to the States, has specifically chosen to exercise Commerce Clause authority over the States.

The rule we offer for this Court's consideration would, we believe, preserve and protect the fundamental principles of federalism without erecting an unreasonable or insurmountable barrier to the enforcement of the clearly stated will of Congress.

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[9] 469 U.S. 528 (1985).



## ARGUMENT

The Framers believed that sovereign immunity of the States was so clear that the doctrine needed no special expression in the Constitution.[10] The Constitution likewise makes no mention of sovereign immunity for the Federal Government. The Framers never expected or intended sovereign immunity of either the States or the Federal Government to be abolished. Sovereign immunity had long been the law. It was understood that it was part of the textural background on which the Constitution was based.[11] *Chisholm v. Georgia*, 2 U.S. 419 (1793) upset

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[10] "The Court's decision in *Hans v. Louisiana*, [citations omitted], offers impressive authority for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the Tenth Amendment. . . . [T]his Court, after canvassing the understanding of the Framers of the Constitution and the controversial decision in *Chisholm*, unanimously concluded that such an action would not lie saying:

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence.

*Fry v. United States*, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting) (quoting *Hans v. Louisiana*, 134 U.S. at 21).

[11] "[T]he Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its

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expectations by showing that the Court was willing to construe Article III expansively. The Eleventh Amendment restored the pre-*Chisholm* understanding that the courts could not displace State sovereign immunity. The Eleventh Amendment is simply a Constitutional exemplification and extension of State sovereign immunity to the federal courts. *Pennsylvania v. Union Gas Co.*, 491 U.S. at 38 (1989) (citing *Ex Parte New York*, 256 U.S. 490 (1921)).

*Hans* did not rely on the express language of the Eleventh Amendment to reach its result.[12] Instead, the Court relied on a broader notion of State sovereign immunity, observing that "[i]t is inherent in the nature of

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jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 491 U.S. at 31-32 (Scalia, J., dissenting). "Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence." *Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 288 (Marshall, J., concurring).

[12] "[I]t was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply [evidence] of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation." *Fry v. United States*, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting).



sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." *Hans*, 134 U.S. at 13 (quoting *The Federalist*, No. 81 (A. Hamilton)). *Hans* recognized a Constitutional principle of the sovereign immunity of the States not limited to the federal forum:

> It may be accepted as a point of departure unquestioned . . . that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution.

*Hans*, 134 U.S. at 16 (quoting *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883)). No case has held that State courts have an obligation to hear a claim that is barred in the federal courts by the Eleventh Amendment.[13] While States may be required to enforce a federal cause of action in their own courts, *Testa v. Katt*, 330 U.S. 386 (1947), it has not been so held where the sovereign immunity of the States is in question.[14]

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[13] In *Employees* this Court noted, but specifically declined to reach, this issue. 411 U.S. at 287. The Court also specifically declined to reach a similar question in *Welch*. 483 U.S. at 476.

[14] Respondent has not raised sovereign immunity as an affirmative defense to an otherwise applicable cause of action, nor have the South Carolina courts declined jurisdiction based on any claimed valid excuse. Cf. *Howlett v. Rose*, 496 U.S. ___,

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The States' rights of sovereign immunity and of immunity from suit in federal court share a common history and development and are difficult to distinguish. What is clear is that the sovereign immunity of the States has long been accepted and continues to be recognized by this Court. *Will*, 491 U.S. at 67. In *Will* this Court reaffirmed, "[t]he principle is elementary that a State cannot be sued in its own courts without its consent." *Id.*

This Court has noted on several occasions that a formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity when acting pursuant to its plenary powers ensures that Congress has not imposed significant burdens on the States without careful thought. *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468 (1987); *Quern v. Jordan*, 440 U.S. 332 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978); *Employees v. Missouri Public Health Dep't*, 411 U.S. 279 (1973).

At a minimum, it is clear that a general authorization for suit in federal court is not sufficient to create a cause of action for money damages enforceable against a State in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). Rather, there must be an unequivocal expression of Congressional intent. *Atascadero*, 473 U.S. at

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110 S. Ct. 2430 (1990). The FELA is not applicable to the South Carolina Public Railways Commission because Congress has not clearly stated an intent that States be included among the class of potential defendants.



240 (1985). Congress must express its intention in the statute itself. *Dellmuth v. Muth*, 491 U.S. at 223 (1989).

This Court has already determined that the language of the FELA is not sufficient to abrogate the States' immunity to suit in federal court. *Welch*, 483 U.S. at 476. The ultimate issue in this case is whether the language of the FELA is nevertheless sufficient to subject States to suit in their own courts on a cause of action not cognizable in federal court. This question, in turn, depends upon whether the clear statement rule of *Atascadero, Welch, Dellmuth*, and other cases, applies with equal force to abrogation of sovereign immunity as well as Eleventh Amendment immunity, an issue upon which this Court has not yet clearly ruled.

This Court's Eleventh Amendment jurisprudence argues for applying the clear statement rule to decide the substantive question of whether the State may be sued at all.[15] Insofar as our research has disclosed, this Court has never differentiated sovereign immunity from Eleventh Amendment immunity in any way which suggests that an abrogation of one, but not the other, need be clearly stated. In fact, the Court's language in several recent cases would certainly lead one to conclude that these two immunities stand on an equal footing.

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[15] "A State's Constitutional interest in immunity encompasses not merely whether it may be sued, by where it may be sued." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. at 99. A State's constitutional interest in whether it may be sued is at least as deserving of clear statement protection as its interest in where it may be sued.

The Court in *Will* implies, but does not go so far as to hold, that a Congressional clear statement of intent is necessary to create a money damages cause of action enforceable against the States in their own courts. The Court referred to the "unmistakably clear in the language of the statute" requirement of *Atascadero* and stated that the scope of the Eleventh Amendment is a consideration in deciphering Congressional intent as to the scope of 42 U.S.C. § 1983. *Will*, 491 U.S. at 66.[16] However, the Court also employed other means to examine Congressional intent, thereby suggesting that the absence of a clear statement in § 1983 was not necessarily dispositive.

Similarly, *Pennsylvania v. Union Gas* hints at a rule requiring a clear statement to create a money damages remedy against the States. The plurality opinion, authored by Justice Brennan, refers to the need to "first decide whether [the federal statute at issue] clearly expresses an intent to hold States liable in damages for conduct described in the statute." 491 U.S. at 7. The plurality concluded that the statutes in question "together convey a message of unmistakable clarity" that "Congress intended that States be liable along with everyone else for clean-up costs recoverable under CERCLA." 491 U.S. at 8. We are fully prepared to conclude that the omission of the words "in federal court" from the quoted passages was not inadvertent. However,

[16] The Court also cited the "clear and manifest" formulation of *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), as further support for the general proposition that a clear statement is required for Congress to encroach upon the powers of the States.



given that the case was in federal, rather than state, court[17], and given Justice Brennan's oft and clearly stated views on the relationship between federal power and State's immunities, we are reluctant to rest our case on this language alone.

*Dellmuth v. Muth* also contains language, broader than necessary to the disposition of that case, which, if read literally, would provide the rule of decision applicable in the instant controversy.

> We now turn our attention to the proper focus of an inquiry into Congressional abrogation of sovereign immunity, the language of the statute. We cannot agree that the textual provisions on which the Court of Appeals relied, or any other provisions of the EHA, demonstrate with unmistakable clarity that Congress intended to abrogate the States' immunity from suit. The EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity.
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> * * *
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> We hold that the statutory language of the EHA does not evince an unmistakably clear intention to abrogate the States' Constitutionally secured immunity from suit.

*Dellmuth*, 491 U.S. at 231-232.

Again, the omission of the words "in federal court" from the quoted passages and the separate references to both Eleventh Amendment and sovereign immunities

[17] The actual holding of the case did refer to actions "in federal court." 491 U.S. at 13.

suggest that "unmistakable clarity" is required for an abrogation of either immunity.

Lastly, and most recently, *Howlett v. Rose* refers to the anomaly presented in the instant case, namely "that a State might be forced to entertain in its own courts suits from which it was immune in federal court . . . " 496 U.S. at ___, 110 S. Ct. at 2436. The anomaly was regarded as

> . . . fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court.

*Id.*

If this language were to be taken literally, then the case presently before the Court would be easily decided on the basis of a simple rule: a State is not subject to suit in its own courts on a federal law cause of action from which it is immune in federal court. Of course, *Will* did not announce such a rule; it addressed the viability of § 1983 actions against States in state court as a matter of statutory interpretation. However, one could readily analogize the instant case to the holding of *Will*, as described in *Howlett*, and find that an entity with Eleventh Amendment immunity is not a "common carrier by railroad" within the meaning of the FELA.[18]

As the above discussion of *Will*, *Union Gas*, *Dellmuth*, and *Howlett* demonstrates, this Court has all but held that

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[18] According to the court in *Howlett*, the holding of *Will* was that, "an entity with Eleventh Amendment immunity is not a 'person' within the meaning of § 1983." *Howlett*, 496 U.S. at ___, 110 S. Ct. at 2436.



the clear statement rule applies with equal force to abrogation of both Eleventh Amendment and sovereign immunities.[19]

In an analogous context, this Court has declined to find abrogation of a common-law immunity where Congress has not clearly expressed its intention to do so. *Tenney v. Brandhove*, 341 U.S. 367 (1951). In *Tenney*, State legislators were sued under the Civil Rights Act of 1871. The Court cited the long history of legislative immunity and found that the general language of the Civil Rights Act did not evidence Congressional intent to overturn the traditional immunity of legislators.

> We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.

*Tenney*, 341 U.S. at 376.

Even though the California legislators were persons and literally within the class of potential defendants, this Court was reluctant to find an abrogation of legislative immunity based on "general language." Legislative immunity, like sovereign immunity, is a doctrine of ancient origin which finds no explicit expression or protection within the Constitution. There is no reason to suppose that clear language is necessary to abrogate the immunity of individual legislators, but not to abrogate immunity of the State they serve.

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[19] The Eleventh Amendment creates or affirms a substantive state right of sovereign immunity. *Mossman v. Donohay*, 46 Ohio St. 2d 1, 16, 346 N.E.2d 305, 314 (1976). In order for the Eleventh Amendment to have any substantive effect, it must be applicable in the state forum as well as the federal one. *Id.*

It is not necessary for this Court to "drop the other shoe" and overrule the holding of *Parden v. Ry.*, 377 U.S. 184 (1964) that the Commerce Clause provides the Constitutional power to abrogate a State's sovereign immunity. But, it is only logical that when Congress exercises this power it must do so in "clear and unmistakable language".

> Although the Supreme Court never has addressed the question whether States may claim immunity in their own courts when the Eleventh Amendment bars suit in federal court, we think that, absent congressional command to the contrary, they may. The *Hans* line of cases indicates that the Constitution was ratified with the implicit assumption that States would retain their sovereign immunity. The only logical interpretation of this implicit constitutional principle is that it must apply regardless of the court in which the State is being sued. Any conclusion to the contrary would decimate the force of the Eleventh Amendment and demote it into nothing more than a choice of forum clause: either the State must consent to be sued in federal court or it will be unwillingly subjected to process in its own courts. We think the Supreme Court's Eleventh Amendment jurisprudence demonstrates a greater respect for the principle of State sovereign immunity.
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> Although it may be clear that the supremacy clause gives Congress the power to abrogate State court immunity in its own as well as in federal courts, [citation omitted] we think that the Supreme Court's understanding of the principles underlying the Eleventh Amendment would require Congress to use equally explicit language in both circumstances. Because the Supreme Court already has determined that the Jones Act does not abrogate State immunity in federal courts, *see Welch, supra*, we think it cannot be interpreted as abrogating State court immunity.



*Morris v. Massachusetts Maritime Academy*, 409 Mass. 179, 184-185, 565 N.E.2d 422, 426-27 (1991).

When Congress abrogates a State's immunity from suit in federal court there is no difference between the language required regardless of whether Congress legislates pursuant to the Fourteenth Amendment or the Commerce Clause. The requirement is that the language be "clear and unmistakable."[20] Such language is also required when abrogating a State's immunity in its own courts under the Fourteenth Amendment. *Will, supra*. The only logical conclusion is that the clear statement rule also applies when Congress abrogates a State's sovereign immunity under the Commerce Clause.

The requirement of a "clear statement" or "certainty" serves important Constitutional functions. This Court has explained that members of Congress play a paramount role in protecting the interests of the States from federal encroachment.[21] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-554 (1985). "The requirement that we be

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[20] See *Dellmuth* and *Atascadero* as to the Fourteenth Amendment and *Welch* as to the Commerce Clause.

[21] What can be more invasive than forcing a State court to take jurisdiction of a cause of action under federal law that it could not undertake under State law, and then if the State is successful, to be subject to appear before this Court on appeal because the case involves a federal question? *Mossman*, 46 Ohio St. 2d at 16, 346 N.E.2d at 314 (1976).

'certain' of Congress' intent is designed to prevent us from casually attributing to Congress the intention of imposing on the states the burden of potential liability in suits for money damages." *Matter of McVey Trucking, Inc.*, 812 F. 2d 311, 325 (7th Cir. 1987) *cert. denied*, 484 U.S. 895 (1987).

> *Garcia* concludes that the primary limit on this [federal] power is the political process of state participation in federal decision-making. If this process is to have its force, legislation that is meant to affect states must say so; states will then be aware of proposed federal legislation perceived to intrude into their operations, and will be able to draw their political weapons. But if legislation is silent or half-heartedly ambiguous as to its effect on states, and a court later declares that it applies to states, the process will have been skewed and the states will have been effectively sandbagged. The result would be a sidestepping of the structural protections outlined in *Garcia* and a return of the judges from the sidelines.

*Welch v. Texas Dep't of Highways and Public Transp.*, 780 F.2d 1268, 1275-76 (5th Cir. 1986) (Higginbotham, J., concurring) *aff'd*, 483 U.S. 468 (1987).

A clear statement both protects the States and keeps the federal courts out of the business of making policy. The clear statement rule would prevent the national government from "devour[ing] the essentials of state sovereignty." *Garcia*, 469 U.S. at 579 (Powell, J., dissenting). The concepts of federalism upon which *Garcia* certainly rests require that federal statutes be construed to exclude States unless Congress expressly indicates otherwise. "If a federal statute does not recite its applicability to States,



the inquiry should end." *Welch*, 780 F.2d at 1275 (Higginbotham, J., concurring).

> By making a law unenforceable against the states unless a contrary intent is apparent in the language of the statute, the clear statement rule would further ensure that attempts to limit state power would be unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interest. Thus a recognition of the peculiar institutional competence of Congress in adjusting federal power relationships makes this an appropriate and useful approach to reconciling national power with state litigational immunity.

L. Tribe, *American Constitutional Law*, § 3-37 at 140 (1978).

The protections afforded by the Eleventh Amendment clear statement cases would be of little value if actions under federal statutes could be brought against States in state court, without an unequivocal expression of Congressional intent. The clear statement rule must apply to both the jurisdictional and substantive issues raised when seeking to apply federal enactments to the States.[22]

The general language "every common carrier by railroad" as employed in the FELA falls short of satisfying

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[22] It would be odd, indeed, to think that Congress intentionally conferred concurrent jurisdiction on State and federal courts under the FELA, but in doing so, intentionally meant to exclude federal jurisdiction where the State is a defendant, but to allow such suits to go forward in state court. Such a strange interpretation of Congressional intent would serve no purpose but to further confuse the issue of State sovereign immunity.

the requirement that the statute contain clear and unmistakable language to abrogate the States' sovereign immunity in their own courts. By overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), this Court determined that these words are not sufficiently clear or specific to include States. *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468 (1987). When Congress has meant to include States, it has done so. The Railway Labor Act specifically refers to "publicly funded and publicly operated" railroads. 45 U.S.C. § 159(a). *See, United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 682 fn. 4 (1982). The only clue as to Congressional intent with respect to the States which is to be found in the text of the FELA suggests that States were not to be included. "Certain specific defenses available to a railroad employer in an employee's personal injury suit were removed, but sovereign immunity was not one of them." *Parden*, 377 U.S. at 199 (White J., dissenting).

Petitioner seemingly does not challenge the proposition that a clear statement of Congressional intent is necessary to create a money damages remedy against the States in their own courts,[23] nor does he suggest that the FELA contains such a statement. Indeed, one examining

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[23] Petitioner's amicus does make an argument that the "unmistakably clear" rule of *Will* is not applicable to this case. However, at bottom, that argument rests upon a distinction between "traditional governmental functions" and commercial or proprietary activities. (Brief of Amicus Curiae, p. 12, fn. 6). The argument is nothing more or less than an offered return to the since rejected approach of *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).



Petitioner's brief on the merits searches in vain for the words "clear statement" or any analysis of Congressional intent. Instead, Petitioner offers a consent argument on two fronts. One has never commanded a majority of this Court and the other has been rejected.

Petitioner first argues that "by 'the plan of the convention' a State's alleged sovereignty may be surrendered." (Pet. Br. 8) In support of this proposition Petitioner cites *Principality of Monaco v. State of Mississippi*, 292 U.S. 313 (1934) and *Pennsylvania v. Union Gas*, *supra*. In the former case it is true that this Court observed that by the adoption of the Constitution the States surrendered their sovereignty, at least as to suits against them by the United States or another State. 292 U.S. at 328-329. But the Court held that no such surrender had taken place as against a foreign state, the putative plaintiff in that case. The Court also reaffirmed the holding of *Hans* that the States are immune from suits brought against them by their own citizens. 292 U.S. at 329. *Principality of Monaco* is hardly support for the proposition that Petitioner, a South Carolina resident, may bring a federal claim against the State of South Carolina in her own courts.

Petitioner's citation of *Pennsylvania v. Union Gas* in support of "the plan of the convention" surrender argument is similarly unavailing. In that case five members of this Court concluded that the Commerce Clause grants Congress the power to enact a statute creating a money damages remedy against the States. But only four members of the Court accepted the "plan of the convention"

argument advanced by Justice Brennan.[24] Justice White, the fifth member of the plurality, concurred "in Justice Brennan's conclusion, but not his reasoning." 491 U.S. at 45. That Justice White does not agree that the States surrendered their sovereign immunity by the "the plan of the convention," is demonstrated by his having joined in Justice Powell's opinion in *Welch*, 483 U.S. at 495. Insofar as we are able to determine, the argument advanced by Justice Brennan, and adopted by Petitioner here, has never commanded a majority of this Court. Accepting the proposition offered by Petitioner would be tantamount to overruling *Hans*, a step this Court need not take to properly resolve the present case.

Petitioner also argues, relying on *Parden*, that by voluntarily operating a railroad in interstate commerce, South Carolina has consented to federal regulation. (Pet. Br. 8) This is nothing more than an attempt to breath new life into the constructive consent theory of *Parden* which was rejected in *Welch*, 483 U.S. at 517. The sovereign immunity of the several States is, in light of *Hans* and its progeny, of Constitutional dimension. "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Edleman v. Jordan*, 415 U.S. 651, 673 (1974).

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[24] The "plan of the convention" argument was briefly outlined in Part III of his opinion, in which Justices Marshall, Blackmun, and Stevens joined. 491 U.S. at 35-36. The argument has been more extensively advanced in other cases. *See, e.g., Welch*, 483 U.S. at 511 (Brennan, J., dissenting); *Atascadero*, 473 U.S. at 248 (Brennan, J., dissenting).



Even if Petitioner's constructive consent or implied waiver theories have survived *Edleman* and *Welch* we believe them to be beside the point. Waiver or consent on the part of a State might be effective to forego a defense to an otherwise applicable federal enactment, but the situation here is far different. The question is whether Congress has created a money damages remedy against the States in derogation of their sovereign immunity, and whether Congress has stated its intention to do so with sufficient clarity to pass Constitutional muster. The State of South Carolina has not asserted sovereign immunity as an affirmative defense to a federal cause of action under which it would be liable but for the defense. If Congress has the Constitutional power to subject States to the liability provisions of the FELA, and if this Court were to determine that Congress clearly exercised its power to do so, then any defensive assertion of sovereign immunity by the States would necessarily fail. *Howlett v. Rose*, 496 U.S. ___, 110 S. Ct. 2430 (1990). The significance of sovereign immunity in the present context lies not in its efficacy as a defense, but in its existence as a Constitutional principle deserving of protection in the form of the clear statement rule. If Congress has the power and has exercised it, the States' consent is unnecessary. If Congress lacks the power, or has not created the remedy, there is nothing to which the State might consent. In either case consent, or lack thereof, is irrelevant.

## CONCLUSION

The States enjoy certain immunities from impermissible encroachments upon their sovereignty by both the legislative and judicial branches of the Federal Government. Exercise of judicial branch authority affecting state treasuries in derogation of the States' Eleventh Amendment immunity is permissible against a nonconsenting State only upon a clear and unequivocal statement of Congressional intent. There is no reason in logic or policy to suppose that a lesser showing is sufficient to warrant intrusion upon the States in their own courts at the behest of Congress. In enacting the FELA Congress did not specifically or unequivocally express an intent to include States among the class of railroad employers potentially liable for money damages under the Act. Absent the required clear statement, the FELA must be held not applicable to state-owned railroads. The opinion of the South Carolina Supreme Court to that effect should be affirmed.

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# REPLY

# BRIEF